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IN THE

Supreme Court of the United States

OCTOBER TERM, 1955

No. [redacted]105

EARL LEROY SCOTT, HARRY D. CRONE, Executor Estate of ESTHER SCOTT CRONE, Deceased, and HERBERT NUSHAWG, *Petitioners,*

v.

FAYETTE COUNTY AGRICULTURAL SOCIETY, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

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To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Earl LeRoy Scott, Harry D. Crone, Executor Estate of Esther Scott Crone, deceased and Herbert Nushawg, Petitioners, pray that a writ of certiorari issue to review the orders of the Supreme Court of Ohio, overruling Petitioners' Motion to Certify the Record, dismissing Petitioners' Appeal as of Right from a judg-

ment and decree of the Court of Appeals, Fayette County, Ohio, and denying Petitioners' Application For Rehearing.

OPINIONS BELOW

The proceeding against Respondent originated in the Court of Common Pleas, Fayette County, Ohio, which Court rendered an opinion in favor of Petitioners on May 26, 1954. Said opinion was entered on May 29, 1954, is not reported, and is attached hereto as Appendix A.

The Court of Appeals, Fayette County, Ohio, reversed the judgment of the Court of Common Pleas in an opinion rendered November 19, 1955. The judgment and decree of said Court was entered December 10, 1955, is unreported, and is attached hereto as Appendix B.

On February 8, 1956, the Supreme Court of Ohio overruled Petitioners' Motion to Certify the Record and dismissed Petitioners' Appeal as of Right from the judgment and decree of the Court of Appeads. On February 29, 1956, the Supreme Court of Ohio denied Petitioners' Application for Rehearing. Said orders are unreported and journal entries of the same, are attached hereto as Appendix C.

JURISDICTION

The order of the Supreme Court of Ohio denying Petitioners' Application For Rehearing was entered February 29, 1956.

The jurisdiction of this Court is invoked under Title 28 U.S.C., Section 1257(3).

QUESTIONS PRESENTED

The Supreme Court of Ohio overruled Petitioners' Motion to Certify the Record and dismissed their Appeal as of Right from the judgment and decree of the Court of Appeals, Fayette County, Ohio, which had refused to enjoin proceedings instituted to appropriate the private property of Petitioners. For simplification, the following questions which are presented for review are intended to refer to the judgment and decree of the said Court of Appeals, as well as to the orders of the Supreme Court of Ohio.

I. Did the Supreme Court of Ohio deprive Petitioners of their constitutional rights by its decision holding that Section 1711.14, Ohio Revised Code, does not violate the Fifth and Fourteenth Amendments to the Constitution of the United States, and Section 19 of Article I of the Constitution of Ohio?

II. Assuming, *arguendo,* that the statute did not violate the Fifth and Fourteenth Amendments to the Constitution of the United States and Section 19 of Article I of the Constitution of Ohio, is the constitutional requirement of just compensation for the taking of private property satisfied in the instant case when Respondent at time of instituting its proceeding to appropriate had insufficient funds with which to pay a compensation award, had taken no steps to provide for the payment of any compensation award, and, as a private corporation, at no time possessed legal authority to provide security or to raise funds in the manner permitted to municipal corporations?

III. Assuming, *arguendo,* that Respondent had adequate funds or could acquire adequate funds with

which to pay for the reasonable value of the property to be taken,

(a) Did the Supreme Court of Ohio err in failing to hold that Respondent acted arbitrarily and in bad faith in seeking to appropriate land in excess of that reasonably necessary for use as a site for agricultural fair purposes?

(b) Did the Supreme Court of Ohio err in failing to hold that the taking of title to property having an estimated value of $250,000 for use as a site for agricultural fair purposes during only 4 days of each year was not a "necessary" public use?

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The constitutional provisions involved are the Fifth and Fourteenth Amendments to the Constitution of the United States and Section 19 of Article I of the Constitution of Ohio.

The pertinent portion of the Fifth Amendment to the Constitution of the United States is as follows:

"* * * nor shall private property be taken for public use, without just compensation."

The pertinent portion of the Fourteenth Amendment to the Constitution of the United States is as follows:

"* * * nor shall any State deprive any person of life, liberty, or property without due process of law; * * *"

Section 19 of Article I of the Constitution of Ohio provides as follows:

> "Private property shall ever be held inviolate, but subservient to the public welfare. When taken in time of war or other public exigency, imperatively requiring its immediate seizure or for the purpose of making or repairing roads, which shall be open to the public, without charge, a compensation shall be made to the owner, in money, and in all other cases, where private property shall be taken for public use, the compensation therefor shall first be made in money, or first secured by a deposit of money; and such compensation shall be assessed by a jury, without deduction for benefits to any property of the owner."

The statutes involved are:

Sections 719.06, 719.21, 1711.14, 1711.15, 1711.16, 1711.18 and 1711.33, Ohio Revised Code.

The above sections of the Ohio Revised Code are attached hereto as Appendix D.

STATEMENT OF CASE

Petitioners are the owners of certain land situate at Washington Court House, Fayette County, Ohio, consisting of two (2) parcels. One parcel contains 47.033 acres and the other contains 2/10ths of an acre. In 1951, Petitioners leased thirty-seven (37) acres of the lands owned by them to the County Commissioners of Fayette County for a period of twenty (20) years, expiring January 1, 1971, at a nominal rental (R. 40, 104, 105). The lease was entered into for the benefit of Respondent and it expressly provided that the County Commissioners had the right to sublet the land to Respondent for its use as an agricultural fair site (R. 46, 106). As a matter of fact, Respondent had been in possession of said thirty-seven (37) acres and

had used the same as an agricultural fair site for more than sixty-five (65) years under a lease (R. 119).

The remaining ten (10) acres owned by Petitioners consist of a strip of land along a state highway having a length of 2068 feet and a depth of 200 feet. This strip of land was not included in the lease to the County Commissioners for three reasons. In the first place, unlike the remaining thirty-seven (37) acres, it had never been used by Respondent as a part of its agricultural fair site (R. 107). In the second place, it possessed an increasing value for commercial use by reason of its fronting on a state highway (R. 200), and, lastly, it was not desired by the County Commissioners.

Respondent is a private corporation organized for profit under the laws of Ohio. For many years, it has held county fairs for a four-day period in each year on the thirty-seven (37) acre tract above referred to and, since 1951, it has enjoyed possession and use of the tract under a sublease from the County Commissioners of Fayette County (R. 104, 106). In addition to holding agricultural fairs, Respondent has also used the leased lands for private purposes (as distinguished from public purposes), such as livestock sales, carnivals, horse stables, horse shows and sales, all of which was admittedly for the purpose of making profit (R. 84, 108, 121). The use of the land for an agricultural fair or public use was limited to only four days in each year (R. 108), while the use of the land for private use was fairly continuous during each year except when the four-day fair was scheduled (R. 121 et seq.).

In addition to the thirty-seven (37) acre tract belonging to Petitioners, Respondent also had available

under lease an adjoining tract of ten (10) acres (not here involved) for use in parking automobiles (R. 108).

On September 26, 1949, the Ohio Legislature enacted Section 1711.14, Ohio Revised Code, which provides as follows:

> "When it is necessary in the opinion of any county agricultural society to procure or enlarge any site *for the purpose of holding an agricultural fair*, and the society and the owner of the property needed for such purposes are unable to agree upon the sale and purchase thereof, the society shall make an accurate plat and description of the parcel of land which it desires for such purpose, and file them with the Probate Judge, or with the Court of Common Pleas in the county in which the land sought to be taken is located. Thereupon the same proceedings of appropriation shall be had which are provided for in Section 719.06 to 719.21, inclusive, of the Revised Code." (Emphasis supplied)

Sections 719.06 to 719.21, inclusive, of the Ohio Revised Code, cover appropriation of property by municipal corporations which, of course, have the power to levy taxes and appropriate money. An agricultural society such as Respondent does not have the power to levy taxes and appropriate money and is dependent on its own earnings, if any, and on voluntary contributions from the County Commissioners under certain conditions and limited as to amount by statute.

On February 13, 1953, Respondent, pursuant to Section 1711.14 above quoted, filed a petition in the Court of Common Pleas, Fayette County, Ohio, to appropriate the forty-seven (47) acres of land owned by Petitioners, including the thirty-seven (37) acres with re-

spect to which it already had possession under a sublease from the County Commissioners. Thereafter, Petitioners filed in said Court a petition for injunctive relief seeking to restrain the Respondent from proceeding with its action to appropriate for title the lands of Petitioners. In their complaint, Petitioners first raised the constitutional questions here sought to be reviewed (R. 40, 69).

The evidence adduced in the lower Courts clearly showed that the lands of Petitioners had a value of between Two Hundred Twenty-five Thousand ($225,000) Dollars and Two Hundred Fifty Thousand ($250,000) Dollars (R. 195); that at the time the proceedings were instituted by the Respondent, it had less than Twenty Thousand ($20,000) Dollars in its treasury (R. 110, 118, 141), and possessed no legal means of raising funds to pay an award that might be made in an appropriation proceeding; and that Respondent sought to appropriate more land than was reasonably necessary for use as a site for an agricultural fair.

On May 26, 1954, the Court of Common Pleas concluded that Petitioners were entitled to the relief prayed for and that Respondent should be permanently enjoined from proceeding to appropriate Petitioners' lands. In its opinion (Appendix A), the Court stated:

> "It is inconceivable to this Court that the use of the property of the plaintiffs for the purpose of a county fair for a period of 4 days in the year can be said to be such a necessary public use as to require private owners of land to forfeit the same when their desire is not to do so, whatever the motive may be. The fact that it must be presumed that they would be adequately compensated under appropriation proceedings provided by law is not

a satisfactory answer. For instance, it may well be the desire of the property owners to retain the property for a period of years with the expectation that its value would be greatly enhanced in the future to their profit, and there may be other reasons, sentimental and otherwise, why the owners would desire to retain their property."

The Respondent appealed from the judgment of the Court of Common Pleas to the Court of Appeals, Fayette County, Ohio, and Petitioners filed a cross-appeal. The cause was submitted on the pleadings, transcript of the docket and journal entries, transcript of evidence, depositions and brief of counsel. On November 19, 1955, the Court of Appeals rendered its opinion reversing the court of Common Pleas and finding in favor of Respondent on all issues. In support of its opinion the Court found from the testimony of Respondent's officers that Respondent would use all of Petitioners' lands for its purposes; that no evidence was offered tending to show that Respondent would be unable to pay the amount of the assessed valuation; that no evidence was offered tending to show a want of good faith on the part of Respondent in seeking to appropriate Petitioners' lands; and that there was no showing that Respondent had acted arbitrarily or had been guilty of an abuse of discretion in determining what amount of property was reasonably required for Respondent's purposes (Appendix B).

These findings were contrary to the evidence, as the record clearly discloses that the 10 most valuable acres of the 47 acres sought to be appropriated had never been used by Respondent in connection with its agricultural fair; that the acquisition of said 10 acres was not necessary for the conduct of the agricultural fair;

that Respondent did not intend to use said 10 acres as a part of its site for an agricultural fair; that the acquisition of said 10 acres would constitute an excess appropriation; that Respondent intended to use Petitioners' lands for purposes other than holding an agricultural fair as it had in the past; that Respondent did not have available resources for the payment of the reasonable value of said lands; that Respondent had taken no steps to provide for the payment of any compensation award (R. 117-118); that Respondent possessed no legal authority to provide security or to raise funds in the manner permitted to municipal corporations; that Petitioners' lands had a fair and reasonable value of $250,000; and that Respondent's use of lands having such a great value for a period of only 4 days in each year was not a necessary public use but a ridiculous and unwarranted exercise of the power of eminent domain (R. 100 et seq.).

Because of the serious constitutional questions involved, Petitioners filed both a Motion to Certify the Record and an Appeal as of Right to the Supreme Court of Ohio. The constitutional questions sought to be reviewed were raised by exception to the judgment and decree of the Court of Appeals, which exception was duly noted on the journal entry filed December 10, 1955, (Appendix B), and also by Assignments of Error filed in the Supreme Court of Ohio (R. 11). On February 8, 1956, the Supreme Court of Ohio overruled the Motion to Certify the Record and dismissed the Appeal As of Right. On February 29, 1956, the Supreme Court of Ohio denied Petitioners' Application For Rehearing. (Appendix C)

REASONS FOR GRANTING THE WRIT

I.

The Statute Under Which Respondent Is Seeking to Appropriate Petitioners' Lands Is Unconstitutional

The basic issue in this case is whether Section 1711.14, Ohio Revised Code, deprives Petitioners of their constitutional rights under the Fifth and Fourteenth Amendments to the Constitution of the United States, and Section 19 of Article I of the Constitution of Ohio.

The validity of the appropriating act relied upon by Respondent in this case is questioned on the ground that it makes no provision for just compensation to Petitioners. As this Court said in *Sweet* v. *Rechel*, 159 U.S. 380, 399, 16 S. Ct. 43:

> "When, however, the legislature provides for the actual taking and appropriation of private property for public use, its authority to enact such a regulation rests upon its right of eminent domain—a right vital to the existence and safety of government. *But it is a condition precedent to the exercise of such power that the statute makes provision for reasonable compensation to the owner.*" (Emphasis supplied)

In the above case this Court cited with approval *Haverhill Bridge Props.* v. *Essex County Com'rs.*, 103 Mass. 120, 124, 4 Am. Rep. 518. In that case the court said:

> "The duty of paying an adequate compensation for private property taken is inseparable from the exercise of the right of eminent domain. The act granting the power must provide for compensation, and a ready means of ascertaining the amount. Payment need not precede the seizure;

> *but the means of securing indemnity must be such that the owner will be put to no risk or unreasonable delay.*" (Emphasis supplied)

In the later case of *Brickett* v. *Haverhill Aqueduct Co.*, 142 Mass. 394, 396, the language of the Court was that:

> "A statute which attempts to authorize the appropriation of private property for public uses, without making adequate provision for compensation, is unconstitutional and void."

In view of the above authorities, it is clear that Section 1711.14, Ohio Revised Code, does not make such provision for reasonable compensation as will be adequate and certain in its results as required by Section 19 of Article I of the Constitution of Ohio.

The same principle was adopted by this Court in *Cherokee Nation* v. *Southern Kansas R. Co.*, 135 U.S. 641, 658 (34 L. ed. 295, 302), when it said:

> "The Constitution declares that private property shall not be taken 'for public use without just compensation.' It does not provide or require that compensation shall be actually paid in advance of the occupancy of the land to be taken. *But the owner is entitled to reasonable, certain and adequate provision before his occupancy is disturbed.*" (Emphasis supplied)

Assuming that the State of Ohio may lawfully delegate by statute the power of eminent domain to political subdivisions of the State and to private corporations, such as Respondent, it is well settled that such statutory delegation of power may not permit the taking of private property for public use without making

adequate provision for the payment of just compensation.

Section 1711.14, Ohio Revised Code, permits a county agricultural society to appropriate a site for the purpose of holding an agricultural fair and it is required, by Sections 719.06 to 719.21, inclusive, Ohio Revised Code, to adopt the same proceedings required of municipal corporations who seek to appropriate private property. However, there exists a great difference between a municipal corporation in the State of Ohio and a private corporation such as Respondent. The municipal corporation has the power to levy taxes and to appropriate money, but no such power is vested in an agricultural society in Ohio. Respondent has neither the power to provide security nor the power to raise funds by the levying of a tax. Its only source of revenue with which to pay a just compensation award is from net receipts derived from the operation of an annual fair and by voluntary allotment from the County Commissioners, which, by statute, is limited to Twenty Thousand ($20,000) Dollars per year (Section 1711.15, Ohio Revised Code).

Any voluntary contributions of more than Twenty Thousand ($20,000) Dollars would require submission of the matter to the qualified electors of the County at a general election at which a majority vote of fifty-five (55%) percent is required for passage (Section 1711.15, Ohio Revised Code). Respondent has no authority to mortgage property or to pledge assets or credit to purchase real estate. The General Assembly of Ohio has never clothed it with power to issue revenue bonds.

While the procedure in appropriation proceedings for a county agricultural society follows that of mu-

nicipal corporations, there is no provision which gives Respondent the right to disregard the plain constitutional limitation on the power of eminent domain, i.e., that private property shall not be taken without just compensation in money. A municipal corporation has general taxing power and a judgment in an appropriation proceeding can be enforced by a writ of execution or by mandamus to compel the levying of a general tax. See *Connecticut River R. Co.* v. *Franklin County Com'rs*, 127 Mass. 50, 52, 56, 34 Am. Rep. 338. No such remedy is available against Respondent. The credit of the municipality is sufficient to guarantee that payment will be made. Respondent cannot give such a guarantee as it is in no different position than any private corporation which is granted the power of eminent domain.

It is axiomatic that a provision for just compensation is indispensable if the power of eminent domain is to be exercised in a constitutional manner. Property owners cannot be made to depend on the doubtful responsibility or the solvency of an agricultural society or its ability to pay just compensation *when the statute under which it seeks to appropriate provides no method for paying just compensation* and where, as in this case, the appropriating entity has no statutory method for raising funds.

The power to appropriate private property is subject not only to the absolute right of the owner to just compensation, but is also subject to the right of the owner to an assurance that adequate provision has been made for the payment of just compensation. This rule has been enunciated in numerous cases. It was followed in the case of *Patchogue* v. *Long Island State Park Commission, et al*, 243 N.Y. 15. In

that case the long Island State Park Commission sought to appropriate lands for public and state park purposes. The Commission did not have on hand the money to pay for the land it sought. In its opinion, the Court stated:

> "It follows inevitably that the power to appropriate lands, as well as to agree on compensation, depends on appropriation of money measurably adequate to justify the Commission to proceed summarily."

The fact that Respondent, although in existence for nearly seventy (70) years, had less than Twenty Thousand ($20,000) Dollars in its treasury at the time it instituted the appropriation proceedings is without dispute. Yet it sought to appropriate lands having an estimated value of Two Hundred Fifty Thousand ($250,000) Dollars and when Petitioners interrogated Respondent's President as to how it would procure the money to pay a compensation award, he refused to state who would contribute or how much might be contributed, and contented himself with the enlightening statement that "it is none of your business". In any event, just compensation cannot be made to depend on voluntary contributions for the reason that they are too uncertain. In re *Manduson*, 51 Fed. 501.

Another case in point is *State Ex Rel Chesterly* v. *Superior Court of Yakima*, 19 Wash. (2d) 791, 144 Pac. (2d) 916. In that case, the State wanted to establish a game sanctuary and an elk refuge, but since the money had not been appropriated for such purposes the proceedings were held to be invalid. In its opinion, the Court said:

> "The legislature has appropriated no funds for the purposes for which the condemnation now be-

fore us were instituted, and we hold that consequently no right existed on the part of the State to initiate the proceedings."

There are many statutes which give to political subdivisions and to private corporations the right to appropriate property, but none give the right to start proceedings unless the property owner can be assured that he will be paid the just compensation to which he is entitled. In the instant case, no such assurance existed and in view of the admitted assets of Respondent, it was fairly apparent from the beginning that Respondent would be unable to pay any reasonable compensation award. Petitioners submit that they should not be put to the expense of an appropriation proceeding only to find that after an award has been made the appropriating authority is unable to pay the award in full.

The rule is well stated by the well known authority *Jahr* in his work on "Eminent Domain" (1953) at section 40:

> "While it is not always necessary in advance of the taking to pay to the owner his compensation, it is necessary that the act provide for a certain and definite and adequate source and manner of payment.
>
> "Thus a statute which authorized the taking of private property for public use must contain a provision, not only for the assessment and collection of just compensation, but also for a definite and certain fund out of which the compensation will be paid." (Page 60)
>
> *and*
>
> "The general responsibility of a private individual or a private corporation does not con-

stitute a certain and adequate provision for compensation. As one of the Courts aptly remarked: 'The property owner cannot be relegated to the doubtful responsibility or solvency of a private corporation or an individual'." (Page 61)

In the case of *Bragg* v. *Yeargin*, 145 Tenn. 643, a school board sought to appropriate land upon which to erect school buildings. The appropriating statute was held unconstitutional because it did not afford the owners a remedy for collection of the amount fixed by the Court. The statute was held to violate both the Tennessee and Federal Constitutions because:

> "* * * No remedy to the landowner is provided by the act for the enforcement or collection of such excess in the event the school boards have not in their hands sufficient funds to pay it."

In the case of *McArthur* v. *Kelly*, 5 Ohio St. 140, 143, the Supreme Court of Ohio stated:

> "Before the owner can, without his consent, be deprived of his land for public use, the legislature must declare by law that the public welfare requires it, (1 B.C. 139) direct the mode of ascertaining its value, and provide for its payment."

The rule has also been stated in the following language:

> "When property is taken for a public use by a private corporation, it is well settled that the right of the owner to obtain and collect a judgment against the corporation by the ordinary processes of law, and subject to risks of insolvency, priority of other claims and the like, is not an adequate provision for compensation no matter how large and prosperous the corporation may be." *Nichols on "Eminent Domain"*, Vol. 3, sec. 8.712.

Petitioners contend that the rule in Ohio as elsewhere is to the effect that a landowner cannot be subjected to an appropriation action unless the appropriating authority is in a position to complete the transaction financially. Section 1711.14, Ohio Revised Code, makes no provision whatever for payment. Neither do the procedural statutes referred to in that section (Sections 719.06 to 719.21, inclusive).

In summary, the enactment of Section 1711.14 alone is not sufficient to authorize appropriation proceedings unless the appropriating authority has the funds available with which to pay a compensation award or unless the appropriating authority has the power to guarantee the payment of an award. In other words, either the ability or the means of payment must be established; otherwise, private property is no longer inviolate and private property may be taken "without just compensation". The sanction given to Respondent's attempted appropriation by the Court below violates the constitutional requirement of just compensation for the taking of private property for public use, and should be corrected by this Court.

II.

The Requirement of Just Compensation Is Not Satisfied in This Case

Under Part I above, we have shown that a provision for compensation in the appropriating act is indispensable and that no such provision is contained in Section 1711.14, Ohio Revised Code. Equally indispensable under constitutional safeguards is the requirement that the appropriating authority must have the money with which to pay a compensation award.

The Respondent's only source of funds with which to pay a compensation award is limited to the money in its treasury and to such money as the County Commissioners of Fayette County may voluntarily allot from the general funds of the County. Neither source is sufficient to assure that the just compensation to be awarded to Petitioners will be paid when assessed by a jury.

The evidence of record clearly discloses that Petitioners' real estate expert (Witness Ben Norris) testified that the land sought to be appropriated had a reasonable market value of Two Hundred Thirty-five Thousand ($235,000) Dollars (R. 195) and that Petitioners had been offered between Two Hundred Twenty-five Thousand ($225,000) and Two Hundred Fifty Thousand ($250,000) Dollars for the property. The evidence also discloses that at the time the appropriation proceeding was instituted by Respondent, it had less than Twenty Thousand ($20,000) Dollars in its treasury (R. 110, 118, 141).

On deposition, Respondent's President (Witness Ray Brandenberg) testified as follows (R. 177 et seq.):

> "Q. Mr. Brandenberg, tell us how you could raise the money?
> Objection by Mr. Brownfield.
> Q. Tell me how much you could raise?
> A. I can't answer that.
> Q. How much are you prepared to pay or how much are you able to pay after a verdict of a jury?
> A. Any reasonable amount.
> Q. How much could you raise to pay a judgment after it is rendered?
> A. Well I don't think I would answer that definitely.
> Q. Could you raise $100,000.00?

A. I think so.

Q. Would you contribute some of the money?

A. I would, and some we could borrow half of it.

Q. Borrow half of it?

A. Yes, we have a little money in the bank.

Q. Less than $20,000.00 in the bank?

A. Yes.

Q. Borrow on the rest?

A. Yes.

Q. Citizens would contribute? You?

A. I don't care to name them. I don't see where it is any of your business who they are. It is none of your business.

Q. Would you expect to give a mortgage on the property?

A. Probably would.

Q. Get some money from the County Commissioners?

A. We would ask them.

Q. Have you ever talked with them about it?

A. Not lately.

Q. You have talked to them?

A. Yes.

Q. They told you they wouldn't contribute one penny?

A. They didn't.

Q. Didn't they tell you that they had no money? Didn't they tell you that?

A. No, they never told me that.

Q. You would expect to get something from them?

A. We would ask them.

Q. Well, if they would give you some, you couldn't get a mortgage?

A. Why can't we?

Q. The law says you can't. It would have to be according to law. In other words, Mr. Brandenberg, you have no arrangements made of any kind to raise the money to pay for this land?

A. I wouldn't say that.

Q. You would have to ask the citizens of the county?

A. I would.

Q. Would you expect to contribute something?

A. That is none of your business.

* * * * *

Q. Mr. Brandenberg, you have declined to answer as to whom you would expect to contribute to this fund, but I will ask you now if you have any definite promises, either oral or in writing from any one specifying amounts such person will contribute to this fund?

A. Orally promises.

Q. From whom?

A. I said before, that is none of your business. Decline to answer.

Q. To what amount would that sum up? What would be the totals of definite promises?

A. I decline to answer that."

In other words, the Respondent did not have sufficient funds on hand to pay a compensation award and had made no arrangements of any kind to raise the needed money (R. 117-118). It proposed to "borrow" and to seek voluntary contributions from members of the community (R. 110, 114, 118, 129, 142). It could not obtain a mortgage on the property which it sought to appropriate because Section 1711.33, Ohio Revised Code, prohibits an agricultural society from encumbering real estate for any purpose other than to pay the cost of necessary repairs and improvements.

The only other source of money would be a limited amount which the County Commissioners of Fayette County would voluntarily contribute from the general funds of the County. Under what circumstances and in what amount may the County Commissioners

appropriate money from its general funds to aid an agricultural society? The answer to this question is contained in Sections 1711.15, 1711.16 and 1711.18, Ohio Revised Code (Appendix D).

Nowhere is there statutory authority enabling the County Commissioners to appropriate money from the general fund to aid an agricultural society to *purchase* real estate. The only financial assistance which Respondent can expect to receive from the County Commissioners is either a contribution to erect or repair buildings *after* Respondent has purchased Petitioners' lands, or a contribution to "pay any other form of indebtedness of said society". Any such contribution is limited by Section 1711.15 to Twenty Thousand ($20,000) Dollars a year and if the same should exceed Twenty Thousand ($20,000) Dollars in any one year, it cannot be made until the question of a levy of the tax therefor is submitted to the qualified electors of the County at a general election at which fifty-five (55%) percent of the vote cast is in favor of such tax.

Assuming, *arguendo*, that the County Commissioners possess statutory authority to assist Repondent in purchasing Petitioners' lands and would like to contribute as much as Twenty Thousand ($20,000) Dollars to accomplish the purchase, nevertheless, the evidence of record discloses that the County had no money in the general fund out of which a contribution could be made. (Witness Clifford R. Hughes, R. 211). Even if the County had sufficient money in its general fund and even if it desired to contribute Twenty Thousand ($20,000) Dollars to aid Respondent in purchasing Petitioners' lands, the total thus available would be

less than Forty Thousand ($40,000) Dollars—clearly insufficient to pay a compensation award.

In the event Respondent hopes to obtain more than Twenty Thousand ($20,000) Dollars from the County Commissioners by way of a contribution, such proposed contribution would have to be submitted to the electors of the County as above stated (R. 212). Such submission to the electors would require a period of at least one year before the electors could pass on the matter (R. 213, Witness Clifford R. Hughes). Even if we assume that the electors voted in favor of such a contribution, Petitioners could not be expected to wait for a period of a year for the just compensation to which they are entitled. As a matter of fact, Section 719.21, Oho Revised Code, recognizes the inequity of requiring a property owner to wait for his just compensation, because it provides that when a *municipal corporation* fails to pay for the property taken within (6) months after the award is made, the right to make the appropriation shall cease and the judgment of the Court shall be void.

The plain fact is that Respondent should either have had sufficient money in its treasury to pay a compensaton award promptly, or it should have obtained a commitment from the County Commissioners to contribute whatever sum was necessary to make payment in full. If a sum greater than Twenty Thousand ($20,000) Dollars was needed as a contribution from the County Commissioners, the matter should have been submitted to the electors before any appropriation proceeding was instituted.

It is inescapable that Respondent had less than Twenty Thousand ($20,000) Dollars in its treasury and could not under any circumstances assure the pay-

ment in full of a compensation award. It fails to meet the indispensable requirement that an appropriating authority must have the money with which to pay a compensation award.

In summary, the constitutional requirement of just compensation cannot be satisfied in this case because Respondent did not have the money to pay a compensation award, had taken no steps to provide for the payment of compensation, and possessed no legal authority to provide security or to raise funds in the manner permitted to municipal corporations. Any sanction of Respondent's attempted appropriation violates Petitioners' constitutional rights and should be corrected by this Court.

III.

Respondent Acted Arbitrarily and in Bad Faith in Seeking to Appropriate Lands in Excess of That Needed for an Agricultural Fair

It is well settled that the necessity and extent of property to be taken by eminent domain is a question for legislative determination and will not be disturbed in the absence of fraud, bad faith or abuse of discretion. *Shepard Paint Co.* v. *Board of Trustees, etc.*, 88 Ohio Apps. 319. It does not follow, however, that Respondent can claim a need for more land than is reasonably necessary for the purpose of conducting an agricultural fair. The extent of the property which Respondent seeks to appropriate must bear a reasonable relationship to its needs. In other words, it cannot seek to appropriate 47 or 57 acres of land when 37 acres of land will suffice for its purposes. Section 1711.14, Ohio Revised Code, does not give a blank check to an agricultural society to appropriate lands far in excess of its reasonable needs. It is proper, therefore,

to inquire as to what are the precise needs of Respondent.

At the time Respondent instituted the appropriation proceeding, it conducted annually a 4-day agricultural fair on a leased site near Washington Court House, Ohio, containing approximately 47 acres of which 10 acres was used for parking purposes. It now seeks to appropriate for title 37 of the original 47 leased acres and an additional 10 acres valued in excess of Sixty Thousand ($60,000) Dollars which had never previously been used by it. If it succeeds in its purpose, it will have a site consisting of 57 acres, 47 acres of which it will own and 10 acres of which it will possess under a lease from the County Commissioners expiring January 1, 1971.

Petitioners contend that the additional 10 acres not heretofore a part of the site or used in connection with the agricultural fair is not necessary for the conduct of the agricultural fair, but constitutes an attempt to make an unjustified excess appropriation. It was not necessary for Respondent's purposes in the past and no showing has been made that it will be necessary for such purposes in the foreseable future. The obvious, although not admitted purpose, of Respondent in seeking to acquire for the first time the additional 10 acres is to take advantage of the land's rapidly increasing value attributable to the fact that Washington Court House is a growing community and is spreading around and beyond the fair site. In view of the fact that Respondent has no valid need for the additional 10 acre tract, it is not unfair to conclude that in the event it succeeds in acquiring the same, it will sell or lease the same for commercial purposes at a profit. The appropriating act does not give

Respondent the right to acquire land either for the purpose of speculative resale or for the purpose of acquiring rental income property, but *only* "for the purpose of holding an agricultural fair".

Nowhere in the record of this case does it appear that the additional 10 acres is necessary for the purpose of holding an agricultural fair. Petitioners may well ask—can Respondent exercise its delegated power to appropriate lands in excess of that needed? Or is such attempted excess appropriation an abuse of discretion and the result of an arbitrary determination made in bad faith?

The question as to whether Respondent has a need for the additional 10 acre tract is largely a question of fact. The fact that the Respondent has conducted the agricultural fair without any previous alleged need for the additional 10 acre tract and without seeking to lease the same for parking or other purposes, *plus* the further fact that the Commissioners of Fayette County, in negotiating the 20 year lease covering the 37 acres, did not seek to have the additional 10 acre tract in question included under the lease but took another 10 acre tract which Respondent is *not* seeking to appropriate, *plus* the further fact that Respondent, as late as December 26, 1950, expressly excepted the additional 10 acre tract in question from the land it sought to appropriate (R. 205-207), fairly and reasonably supports the conclusion that the additional 10 acre tract is not necessary for Respondent's purpose "of holding an agricultural fair", but constitutes an arbitrary determination reached in bad faith.

In summary, an appropriating authority has no right to arbitrarily appropriate lands in excess of that needed for the purposes defined in the appropriating

act. Any sanction of Respondent's attempted appropriation of lands in excess of that reasonably needed for use as an agricultural fair violates Petitioners' constitutional rights and should be corrected by this Court.

IV.

Respondent Has Failed to Establish a Necessary Public Use

It is well settled by numerous decisions in this Court and in Ohio that the power conferred upon an appropriating authority to take private property for public use must be strictly followed. The limitations on the exercise of this power are well established. The basic question is whether the use for which the land is appropriated is a *necessary* public use. The determination of this question is essentially a judicial matter. In other words, the legislative authority may determine the extent and the need to take private property, but whether the use to which the property is to be put is a public necessity is a question for the courts.

In the case of *Hairston* v. *Danville Western Railroad Co.*, 208 U.S. 598, this Court stated:

> "When we come to consider what are public uses for which the right of compulsory taking may be employed, and what are private uses for which the right is forbidden we find no agreement either in reason or in conclusion. The one and only principle in which all courts seem to agree is that the nature of the uses, whether public or private, is ultimately a judicial question."

In the case of *Cincinnati* v. *Vester*, 281 U.S. 439, 446, Chief Justice Hughes, speaking for the Court, said:

> "It is well established that in considering the application of the Fourteenth Amendment to cases

> of expropriation of private property, the question what is a public use is a judicial one. In deciding such a question, the Court has appropriate regard to the diversity of local conditions and considers with great respect legislative declarations and in particular the judgments of state courts as to the uses considered to be public in the light of local exigencies. But the question remains a judicial one which this Court must decide in performing its duty of enforcing the provisions of the Federal Constitution."

In the case of *Sargeant* v. *City of Cincinnati*, 110 O.S. 444, the Court in its opinion employed the following language:

> "All these legislative functions relate to the necessity and exigency of the taking, but owners of private property may judicially inquire whether the specified use is a public use."

Petitioners contend that the proposed use of their lands as a site for an agricultural fair held during only 4 days of each year is not such a necessary public use as will justify its appropriation and therefore they are entitled to the injunctive relief which they seek.

It must be remembered that the Appropriating Act (Section 1711.14, Ohio Revised Code) only permits Respondent to procure a site for the purpose of holding an agricultural fair. The Court of Appeals in its opinion (Appendix B), however, departed from the language of Section 1711.14. It found that the lands sought to be appropriated were for a necessary public use because they "are needed for many public activities of defendant, including programs for 4-H Clubs for boys and girls; Junior and Senior department FHA and FFA; Exhibits sponsored by Garden Clubs;

Health Groups; Farm Bureau; Grange and State Highway Department; also exhibits of livestock, grain, fruit, sewing, canning, cooking and other public uses."

However praiseworthy these uses may be, they certainly do not qualify as *necessary* public uses, especially in view of the fact that Respondent is a private corporation organized for profit and not a political subdivision of the State of Ohio.

The mere fact that Respondent may be performing a useful semi-public function does not establish it as a public body. In the case of *Dunn* v. *Agricultural Society*, 40 O.S. 93, the Court stated that the purpose of such a society may be public "but only in the sense that they are designed for the accomplishment of some public good", and it was pointed out "in that sense all private corporations are for a public purpose, inasmuch as such public benefit is both a consideration and justification for the special privileges and franchises conferred upon them."

In determining whether the proposed use of Petitioners' lands is a *necessary* public use, the only use that may be considered is the use of the land as a site for an agricultural fair.

The Courts below found that Petitioners' lands would be used only 4 days in each year for an agricultural fair. Is this a necessary public use which will permit the taking of private property without the consent of the owner? Petitioners hold, as did the Court of Common Pleas below, that such use of their property is not a necessary public use and any contrary holding will destroy the inviolability of private property guaranteed by Section 19 of Article I of the Ohio Constitution. It is inconceivable to Petitioners, as it

was to the Court of Common Pleas below, that the use of property having an estimated value of $250,000 for the purpose of a county fair for a period of only 4 days in the year can be said to be such a necessary public use as to require Petitioners to surrender their property when it is their desire not to do so.

In summary, the Court of Appeals below, avoided passing upon the question of whether the use of land worth $250,000 as a site for an agricultural fair conducted only during 4 days in each year was a necessary public use. It erroneously confused Respondent's "public activities" with "necessary public use". The sanction given to Respondent's attempted appropriation by the Court below violates Petitioners' constitutional rights and should be corrected by this Court.

CONCLUSION

The instant case presents squarely to this Court the question of whether a state statute which attempts to authorize a county agricultural society to take private property for public use but fails to make adequate provision for the payment of just compensation to the property owner is thereby unconstitutional and void.

If a county agricultural society, acting pursuant to a statute authorizing it to take private property, is permitted to appropriate lands without the property owner being assured that reasonable, certain and adequate provision for payment of just compensation has been made or that he will be put to no risk or unreasonable delay in obtaining just compensation, then the guarantees of the Federal and State Constitutions will be destroyed and the security of private property in this country will no longer be "inviolate".

In any event, this Court should determine that the constitutional requirement of just compensation cannot be satisfied in this case because Respondent had no money with which to pay a compensation award and had no legal authority to provide security or to raise funds in the manner permitted to municipal corporations.

Moreover, this Court should determine that Respondent has failed to establish that the lands which it seeks to appropriate were for a necessary public use. It is respectfully suggested this Court should determine whether a state court by the mere use of the magic words "public use", without substantial basis, may curtail important constitutional rights. Should this Court determine that appropriating valuable property usable for commercial and residential purposes for use as an agricultural fair during only 4 days in each year is a necessary public use, then the Court should determine that Respondent's attempted appropriation of more lands than it reasonably needs for its purposes constitutes an act of bad faith and an abuse of discretion.

If the decision of the Ohio Court of Appeals is permitted to stand in view of the facts set forth herein, then the constitutional rights of all property owners will be irreparably impaired.

WHEREFORE, Petitioners pray that this Petition for writ of certiorari be granted to the end that the judg-

ment and decree of the Court of Appeals, Fayette County, Ohio, may be reversed by this Court.

Respectfully submitted,

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